Chuah Sean Kin & Ors v Persatuan Kenel Anjing Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D4–24–5 OF 2008
ROHANA YUSUF J
11 JULY 2008

Companies and Corporations — Meetings — Extraordinary general meeting ('EGM') — Application for appointment of independent officer to conduct fresh EGM — Whether earlier EGM lacked quorum — Whether plaintiff failed to exhaust other remedies under article of association — Whether proceedings premature

The plaintiff relied on s 150 of the Companies Act 1965 ('the Act') and sought in encl 1 for orders of the court to appoint an independent officer to conduct the extraordinary general meeting ('EGM') of the Persatuan Kenel Anjing Malaysia ('the company'). The company limited by guarantee, does not have a share capital. The company is an institution with the exclusive authority to register pure bred dogs and is affiliated to other Kennel Association in the world. The company was managed by the Central Committee, which was headed by the second defendant as president up until 18 February 2008. The company called for an EGM on 10 November 2007 to deliberate on the amendment of its articles of association and had distributed proxy forms to its members. The EGM was informed that there were six proxy holders with the second defendant had the largest number of proxies. The ninth plaintiff and few other members alleged that there were manipulations of proxy forms and subsequently lodged a police report. The Central Committee allegedly proceeded to expel/terminate the general members and members from the Central Committee who had questioned the alleged manipulation. On 15 February 2008, the company convened an annual general meeting ('AGM') for the year 2007/2008 to approve the accounts for 2006/2007. During the AGM it was alleged that the second defendant had manipulated the membership list to include 53 new members to vote for the accounts for 2006/2007 to be adopted. Various statutory declarations had been made in respect to the allegation of impropriety.

Held, dismissing the application with costs:

(1) There was no contention that the EGM could not be held due to lack

of quorum. There was also no suggestion that the meeting could be conducted in the manner provided for, in the company's article of association. The plaintiff's complaint over the validity of certain proxy forms in an earlier EGM was a matter that should have been challenged by the plaintiff in a proper legal proceeding. The plaintiff had failed to fulfil two situations in s 150 of the Act namely that it was impractical to call for a meeting and that it was impractical to conduct a meeting in accordance with articles of the company or s 150 of the Act (see para 8(1)).

(2) The plaintiffs have participated in the appointment of the new central committee members for the year of 2008/2009. No wrong allegation was made against the newly elected central committee of which the two plaintiffs were also members. In the central committee meeting held on 5 March 2008 the new president had addressed matters relating to the proposed amendments to the constitution. The matter was resolved whereby the central committee had decided not to amend the constitution and majority of the committee members supported the proposal. The dispute as regards to the amendment had since become academic and redundant (see para 8(2)).

(3) The plaintiff had failed to exhaust all avenues as provided for in the company's article of association before proceeding to the court. There were at least three domestic remedies, namely; (i) to lodge a report with the central committee for the matter to be investigated; (ii) to call for another EGM of MKA members to resolve the dispute with the central committee; or (iii) to refer the dispute to arbitration. Hence, the plaintiff's proceedings was premature (see para 8(3)).

(4) The action and decision of the central committee would prevail provided it does not contravene the article of association of the company. Members could only bring an action to challenge the decision of the central committee after it was made and implemented but not before such occurrence (see para 9).

[Bahasa Malaysia summary

Plaintif bergantung kepada s 150 Akta Syarikat 1965 ('Akta') dan menuntut dalam lampiran 1 untuk perintah-perintah mahkamah bagi melantik pegawai bebas untuk mengadakan mesyuarat agung luarbiasa ('EGM') Persatuan Kenel Anjing Malaysia ('syarikat'). Syarikat tersebut yang terhad oleh jaminan, tidak mempunyai modal syer. Syarikat itu merupakan institusi dengan kuasa eksklusif untuk mendaftarkan baka anjing jati dan bergabung dengan Persatuan Kennel lain di dunia. Syarikat diuruskan oleh Jawatankuasa Pusat, yang diketuai oleh defendan kedua sebagai presiden sehingga 18 Februari 2008. Syarikat mengadakan EGM pada 10 November 2007

untuk mempertimbangkan pindaan kepada tataurusan persatuannya dan mengagih-agihkan borang proksi kepada ahli-ahlinya. EGM telah dimaklumkan bahawa terdapat enam pemegang proksi bersama-sama defendan kedua mempunyai proksi-proksi yang paling banyak. Plaintif kesembilan dan beberapa ahli yang lain mengatakan bahawa terdapat manipulasi borang-borang proksi dan kemudiannya membuat laporan polis. Jawatankuasa Pusat dikatakan telah mengusir/membuang ahli-ahli umum dan ahli-ahli daripada Jawatankuasa Pusat yang mempersoalkan manipulasi yang dikatakan itu. Pada 15 Februari 2008, syarikat mengadakan mesyuarat umum tahunan ('AGM') bagi tahun 2007/2008 untuk meluluskan akaun-akaun untuk 2006/2007. Sewaktu AGM, defendan kedua telah dikatakan memanipulasi senarai keahlian untuk memasukkan 53 orang ahli-ahli baru untuk mengundi agar akaun 2006/2007 diterima. Pelbagai akuan statutori dibuat berkaitan dengan dakwaan salah laku.

Diputuskan, menolak permohonan dengan kos:

(1) Tidak terdapat sebarang hujahan bahawa EGM tidak dapat diadakan kerana kekurangan kuorum. Juga tidak terdapat sebarang cadangan bahawa mesyuarat itu tidak boleh dijalankan sepertimana yang disediakan di dalam tataurusan persatuan. Aduan plaintif mengenai kesahan borang-borang proksi di dalam EGM terdahulu merupakan perkara yang sepatutnya dicabar plaintif dalam prosiding undang-undang yang betul. Plaintif telah gagal memenuhi dua situasi dalam s 150 Akta bahawa adalah tidak praktikal untuk menuntut mesyuarat diadakan dan mengadakannya sepertimana dalam tataurusan persatuan atau s 150 Akta (lihat perenggan 8(1)).

(2) Plaintif-plaintif telah menyertai pemilihan ahli-ahli jawatankuasa pusat bagi tahun 2008/2009. Tiada tuduhan salah dibuat ke atas ahli-ahli jawatankuasa pusat yang baru dilantik yang mana kedua-dua plaintif merupakan ahli-ahlinya. Dalam mesyuarat jawatankuasa pusat yang diadakan pada 5 Mac 2008 presiden yang baru telah mengemukakan perkara berkaitan pindaan yang dicadangkan kepada perlembagaan. Perkara ini telah diselesaikan apabila jawatankuasa pusat telah memutuskan untuk tidak meminda perlembagaan dan majoriti ahli jawatankuasa menyokong cadangan itu. Pertikaian mengenai pindaan oleh itu menjadi akademik dan tidak perlu (lihat perenggan 8(2)).

(3) Plaintif telah gagal menggunakan segala cara yang diperuntukkan dalam tataurusan persatuan syarikat sebelum memulakan tindakan di mahkamah. Terdapat sekurang-kurangnya tiga remedi domestik, iaitu; (i) untuk membuat laporan kepada jawatankuasa pusat agar perkara itu disiasat; (ii) untuk mengadakan EGM ahli-ahli MKA yang lain untuk menyelesaikan pertikaian dengan jawatankuasa pusat; atau (iii) untuk

merujuk pertikaian kepada timbang tara. Oleh itu, prosiding plaintif adalah prematang (lihat perenggan 8(3)).

(4) Tindakan dan keputusan jawatankuasa pusat akan dipakai dengan syarat bahawa ia tidak bercanggah dengan tataurusan persatuan syarikat. Ahli-ahli hanya boleh mengambil tindakan untuk mencabar keputusan jawatankuasa syarikat selepas keputusan dibuat dan dilaksanakan tetapi bukan sebelum keputusan tersebut (lihat perenggan 9).]

Notes

For extraordinary general meeting, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 450–458.

Cases referred to

Foo Tong Eng v Po Gun Suan [1982] 1 MLJ 337, HC (refd)
Irene Ng v The Malaysia Kennel Association [2004] LNS 630, HC (refd)
Leong Ah Hong v Hup Seng Eng [1963] MLJ 164, HC (refd)
Low Son Siang v Lee Kim Yong [1999] 1 CLJ 529, HC (refd)
Phuar Kong Seng v Lim Hua [2005] 2 MLJ 338, HC (refd)

Legislation referred to

Companies Act 1965 s 150

Christie Soosay (Stanley Sinnappan with him) (Vazeer Akhbar Majid & Co) for the plaintiffs.
Jerald Gomez (Suzalena bt Salleh with him) (Jerald Gomez & Associates) for the defendants.

Rohana Yusuf J:

[1] The originating summons by the plaintiff in encl 1 seeks orders of this court to appoint an independent officer to conduct the EGM of the company and to do other consequential acts relating thereto.

BRIEF FACTS

[2] The first defendant is a company limited by guarantee and not having a share capital. The first defendant is an institution with the power to register pure bred dogs in Malaysia. It is the only institution capable of registering dog's pedigree and is affiliated to other Kennel Associations in the world. It is managed by a committee known as the Central Committee which was

A headed by the second defendant as president up until 18 February 2008.

The EGM of 10 November 2007

B **[3]** The first defendant has called for an EGM on 10 November 2007 to discuss on the amendment of its articles of association. In furtherance of the said EGM, the first defendant has sent out proxy forms to its members to enable them to cast their votes by proxy if they are unable to attend the EGM. At the said EGM it was announced that the valid proxies returned C were 1372 and 41 were declared spoilt. The EGM was also informed that there were 6 proxy holders including the second defendant who holds the biggest number ie 740 proxies.

D **[4]** There is allegation of manipulations of proxy forms when ninth plaintiff and few other members found their names were also on the proxy list despite no proxy form has been sent to any of the 6 proxy holders. They alleged forgery and police reports were lodged. The Central Committee headed by the second defendant then, allegedly proceeded to expel or E terminate the general members and even members of the Central Committee itself who have questioned them on the above.

The AGM of 15 February 2008

F **[5]** The company led by the second defendant called an AGM for the year 2007/2008 to approve the accounts for 2006/2007. At the said AGM it was alleged that the second defendant manipulated the membership list to include 53 new members to vote for the accounts to be adopted. The 53 new members were said to be all foreign factory workers having their residence G address at No 17, Jalan SS25/24, Taman Mayang, Petaling Jaya, Selangor.

The originating summons dated 3 January 2008

H **[6]** Premised on the above background the originating summons is made under s 150 of the Companies Act 1965 which provides that if for impracticable reason the court may either on application or on its own motion order a meeting to be called, held and conducted in the manner the court thinks fit.

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[7] The plaintiff is applying from this court to make order to conduct meeting due to alleged malpractices in the earlier EGM of 10 November 2007 where there were allegations of forged proxy forms been used for the purposes of meeting the quorum of the meeting. The allegation of

impropriety is based on various statutory declarations in exhs K-15 and K-20.

FINDINGS AND DECISIONS

[8]. (1) *Applicability of s 150 of the Companies Act*

To succeed in an application under s 150 two situations must be present. First the section applies where it is impracticable to call for a meeting and second it is impracticable to conduct a meeting in accordance with the articles of the company or the Act. Such situations were normally present where owing to refusal of a group of shareholders to attend meetings, a quorum is denied and meetings of the company are therefore impossible to be held, accordingly.

As decided by another High Court by Abdul Malik Ishak J (as he then was) in the case of *Low Son Siang v Lee Kim Yong* [1999] 1 CLJ 529 (HC) at p 532:

> The onus of proving whether the desired AGM can be conducted in accordance with Articles of Association, the onus of showing impracticability is on the plaintiff.

Leong Ah Hong v Hup Seng Eng [1963] MLJ 164 (HC)

'impractical' because — no quorum

Foo Tong Eng v Po Gun Suan [1982] 1 MLJ 337 (HC)

Oppression of minority petition — company should be allowed to function — redress to remedies recognised by law.

Low Son Siang v Lee Kim Yong [1999] 1 CLJ 529 (HC) — s 150 — Abdul Malik Ishak J decision.

Onus on plaintiff to show impractical to conduct a meeting also related to quorum.

Phuar Kong Seng v Lim Hua [2005] 2 MLJ 338 (HC)

No quorum — impractical to hold meeting.

In the present case, I find that there is no contention that the EGM cannot be held because of quorum failure. There is also no suggestion that the meeting cannot be conducted in the manner provided for, in its articles. The crux of the complaint by the plaintiffs is over *the validity of certain proxy forms in an earlier EGM*. For this I am inclined to agree with the submission of the defendants that this is a matter that should be challenged by the plaintiffs in a proper legal proceeding. In short, there are remedies readily available to the plaintiffs, it is clear that s 150 is wrongly invoked since the plaintiffs do not satisfy the two conditions stated above.

(2) *The wrongdoing/alleged forgery*

The wrongdoing or alleged forgery was against the Central Committee then who are now substituted with a new set for the year of 2008/2010. The plaintiffs have participated in the appointment of the new Central Committee as members. No wrong allegation was made on the present elected Central Committee. Two of the plaintiffs in fact are now part of the new Central Committee.

In a Central Committee meeting held on 5 March 2008, the new president addressed the issue of the present action and the disputed on proposed amendments to the constitution. This has been resolved whereby the committee has decided not to amend the constitution and this proposal was supported by the majority of the committee members. The dispute as regards to the amendment has since become academic and redundant.

(3) *The plaintiffs have not fully exhausted local remedies*

The law is clear that a plaintiff must exhaust all avenues before going to court. The plaintiffs here have at least three other domestic remedies before going to court as provided in the company's article of association ie to lodge a report with the Central Committee for the matter to be investigated. Second, to call for another EGM of MKA members to resolve the dispute with the Central Committee or finally, they can refer the dispute to arbitration. The institution of this proceedings by the plaintiffs is therefore premature.

(4) *The court cannot interfere with the literal operation of the company.*

In an earlier case involving the same defendant, case of *Irene Ng v The Malaysia Kennel Association* [2004] LNS 630 (HC) where Raus Shariff J noted:

> MKA is a private non-profit organisation. The governing body of MKA is the Central Committee ... MKA regulates its affairs in accordance the memorandum and articles of association of MKA do not make it possible to delegate the said function. The duty is placed on the Central Committee ... Similarly the body empowered to hear the charges against the plaintiff is the Central Committee.

[8] In the above decision MKA is a non-profit organisation which is bound by its own articles and by laws. There is no reason for me to depart from that finding. The court then did not interfere or substitute the decision of the Central Committee but upheld the Committee's actions and decision so long as it does not contravene the article of association. It only allows members to bring an action to challenge a decision after it was made and implemented but not before.

[9] Based on the above reasons I hereby dismiss the originating summons by the plaintiffs in encl 1 with costs.

Application dismissed with costs.

Reported by Mashrifah Ravendran